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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 390

LEXINGTON WATER POWER COMPANY
Complainant-Appellant

v.

WALTER G. QUERY, J. P. DERHAM and FRANK C. ROBINSON, as members of and constituting the South Carolina Tax Commission
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION ON APPEAL

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APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

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Defendants-Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

In compliance with Rule 12 of this Court the appellant states:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction of this Court to review the decree of the court below is Section 266 of the Judicial Code (United States Code Annotated, Title 28, Section 380) which provides that an appeal may be taken direct to the Supreme Court of the United States from a decree granting or denying a permanent injunction in a case of the character therein described. The decree sought to be reviewed by this appeal is a decree denying a permanent injunction in a suit instituted against the Tax Com-

mission of the State of South Carolina seeking to restrain the enforcement of a statute levying a tax on electricity, on the ground that said statute was unconstitutional, heard before the statutory court of three judges which denied a temporary injunction, which is a suit of the character described in the above-mentioned statute.

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 21st day of July, 1932 (R. 104).*

The application for appeal was presented on the 23rd day of July, 1932 (R. 109).

C.

Nature of Case and Ruling Below.

This suit was instituted by a bill of complaint filed on June 6, 1931 (R. 2), in which the complainant prayed for a temporary and permanent injunction restraining the defendants, the Tax Commission of the State of South Carolina, from collecting the taxes attempted to be imposed by an Act of the Legislature of South Carolina which became a law on May 9, 1931 (R. 19), which purports to levy a tax of one-half mill per kilowatt hour on electricity generated by water power or steam within the State of South Carolina or sold within the State of South Carolina.

The Tax Act above referred to was alleged to be unconstitutional because:

1. The classification of subjects of taxation amounted to a denial of equal protection of the laws

* All references to the record are to pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

in violation of the Fourteenth Amendment to the Federal Constitution as well as the similar provision in the Constitution of South Carolina.

2. The statute as applied to the complainant was unconstitutional as an attempt to levy a tax on an agency of the United States Government, inasmuch as the tax was a license or privilege tax on complainant's operation of a water power plant constructed and operated under a permit from the Federal Power Commission issued under the Federal Water Power Act.

3. The statute as applied to the complainant was an unlawful interference with interstate commerce in violation of Section 8 of Article I of the Constitution of the United States, as the electricity generated at the complainant's plant was generated for use in the State of North Carolina.

Thereafter, pursuant to Section 266 of the Judicial Code, the District Judge of the United States District Court for the Eastern District of South Carolina called together three judges to hear and determine the application for an interlocutory injunction, the application being heard on July 9, 1931.

On September 7, 1931, the Court of three judges, in an opinion by Honorable JOHN J. PARKER, Circuit Judge, denied the interlocutory injunction prayed for (R. 65). Honorable ELLIOTT NORTHCOTT, Circuit Judge, and Honorable ERNEST F. COCHRAN, District Judge, concurred. The Court made findings of fact and conclusions of law (R. 85) overruling the contentions of complainant, and entered an order or decree denying the interlocutory injunction prayed for (R. 89). An appeal was thereupon taken to this Court, upon which

appeal the order denying the interlocutory injunction was affirmed, without considering the merits of the case (286 U. S. 525), on the authority of *Alabama* v. *United States*, 279 U. S. 229, and similar cases.

The case subsequently came on for final hearing and a final decree was entered dismissing the bill (R. 104).

On July 23, 1932, complainant filed a petition for appeal, assignment of errors and prayer for reversal (R. 109). Said petition for appeal was allowed on July 23, 1932 (R. 111).

The citation on appeal was issued July 25, 1932 (R. 115).

The time for filing the transcript of record was subsequently extended for thirty (30) days (R. 112).

The transcript of record was filed and the case docketed in this Court on September 22, 1932.

D.

Cases Supporting Jurisdiction of Court.

The jurisdiction of this Court is sustained by the statutory provision granting a direct appeal to this Court from the decree of the District Court in cases of this character (Section 266 of Judicial Code; Title 28, Section 380 United States Code Annotated). It is also sustained by the following cases which support the jurisdiction of this Court in cases of this character:

Interstate Buses Corporation v. *Blodgett*, 276 U. S. 245;

Herkness v. *Irion*, 278 U. S. 92.

All of which is respectfully submitted.

W. C. McLain,
George M. LePine,
Solicitors for Appellant.

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CLERK

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Commission of the State of South Carolina seeking to restrain the enforcement of a statute levying a tax on electricity, on the ground that said statute was unconstitutional, heard before the statutory court of three judges which denied a temporary injunction, which is a suit of the character described in the above-mentioned statute.

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 21st day of July, 1932 (R. 79).*

The application for appeal was presented on the 23rd day of July, 1932 (R. 84).

C.

Nature of Case and Ruling Below.

This suit was instituted by a bill of complaint filed on June 6, 1931 (R. 2), in which the complainant prayed for a temporary and permanent injunction restraining the defendants, the Tax Commission of the State of South Carolina, from collecting the taxes attempted to be imposed by an Act of the Legislature of South Carolina which became a law on May 9, 1931 (R. 14), which purports to levy a tax of one-half mill per kilowatt hour on electricity generated by water power or steam within the State of South Carolina or sold within the State of South Carolina.

The Tax Act above referred to was alleged to be unconstitutional because the classification of subjects of taxation

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amounted to a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution as well as the similar provision in the Constitution of South Carolina.

Thereafter, pursuant to Section 266 of the Judicial Code, the District Judge of the United States District Court for the Eastern District of South Carolina called together three judges to hear and determine the application for an interlocutory injunction, the application being heard on July 9, 1931.

On September 7, 1931, the Court of three judges, in an opinion by Honorable JOHN J. PARKER, Circuit Judge, denied the interlocutory injunction prayed for (R. 36). Honorable ELLIOTT NORTHCOTT, Circuit Judge, and Honorable ERNEST F. COCHRAN, District Judge, concurred. The Court made findings of fact and conclusions of law (R. 61) overruling the contentions of complainant, and entered an order or decree denying the interlocutory injunction prayed for (R. 65). An appeal was thereupon taken to this Court, upon which appeal the order denying the interlocutory injunction was affirmed, without considering the merits of the case (286 U. S. 525), on the authority of *Alabama* v. *United States*, 279 U. S. 229, and similar cases.

The case subsequently came on for final hearing and a final decree was entered dismissing the bill (R. 79).

On July 23, 1932, complainant filed a petition for appeal, assignment of errors and prayer for reversal (R. 84). The petition for appeal was allowed on July 23, 1932 (R. 86).

The citation on appeal was issued July 25, 1932 (R. 89).

The time for filing the transcript of record was subsequently extended for thirty (30) days (R. 87).

The transcript of record was filed and the case docketed in this Court on September 22, 1932.

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Cases Supporting Jurisdiction of Court.

The jurisdiction of this Court is sustained by the statutory provision granting a direct appeal to this Court from the order of the District Court in cases of this character (Section 266 of Judicial Code; Title 28, Section 380 United States Code Annotated). It is also sustained by the following cases which support the jurisdiction of this Court in cases of this character:

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